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No. 86-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

KEYSTONE CONSOLIDATED INDUSTRIES, INC.,
Petitioner,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 449,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION FOR UAW & ITS LOCAL 449

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Under a bargained Pension Agreement, Keystone must make annual contributions to fund the Plan. The amount is actuarially determined, implementing funding language in the Agreement. An arbitrator orders the 1979-80 contribution of $2,147,932 paid, with interest. Keystone refuses, arguing that, having obtained an *ex parte* waiver of ERISA's § 303 minimum funding requirements from the IRS, 29 U.S.C. § 1083, it is excused from the contractual obligation.

1. Does an IRS waiver of *statutory* minimum funding requirements extinguish private *contractual* obligations to fund the pension plan, as contrary to public policy?

2. If so, since the IRS is an Article I agency operating *ex parte*, does this extinction of private contract rights satisfy: (i) Fifth Amendment due process, and (ii) the prohibition against the delegation of Article III powers to an Article I agency?

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The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), and its Local 449,[1] by counsel, respectfully pray that the Court *deny* the Petition for Writ of *Certiorari.*

OPINIONS BELOW

The opinions below are reported at: *UAW & Its Local 449 v. Keystone Con. Ind.*, 793 F. 2d 810 (7th Cir.

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[1] Hereafter, jointly "UAW" or "Union."

1986), *on rehearing withdrawing*, 782 F. 2d 1400 (7th Cir. 1986), and *aff'g* No. 82-C-20189 (N.D. Ill. Feb. 27, 1984), which enforced the arbitration award.[2] The original panel opinion was withdrawn on rehearing after the United States filed an *amicus* brief urging rehearing.[3]

COUNTERSTATEMENT OF THE CASE

ERISA imposes certain minimum funding requirements on all sponsors of private, defined benefit pension plans, § 302, 29 U.S.C. § 1082. These are statutory requirements, and, as such, apply to all such plans *whether or not* collectively bargained. ERISA's § 303, 29 U.S.C. § 1083, allows the IRS to grant waivers of this *statutory* minimum, on a year-by-year basis, within stated limits. Such waivers are handled on an *ex parte* basis by the IRS because (i) § 6103 of the Code, 26 U.S.C. § 6103, prohibits disclosure of tax return information, and (ii) involvement of the participants or their representative would be cumbersome. *See* Rev. Proc. 83-41, 1983-1 Cum. Bull. 775.[4]

In its labor Agreement, Keystone undertook to fund the pension plan in an annual amount greater, and at a

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[2] The unpublished arbitration award, dated October 8, 1982, is *reproduced* in the Appendix before the Circuit, Cir. App. 10-35. The District Court first entered an Order, filed June 16, 1983, remanding to the arbitrator for clarification on the date payment was due. This Order is *reproduced* at Pet. App. 43a-48a. The arbitrator issued a Supplemental Award, dated July 7, 1983, *reproduced* Cir. App. 36-38, requiring immediate payment. On return to the District Court, the award was enforced by the February 27, 1984, Order which simply provided: "For the reasons set forth in this court's order of June 16, 1983, plaintiff's motion for summary judgment is granted and defendant's motion is denied." Cir. App. 9.

[3] The brief was filed by the Tax Division of the Department of Justice, representing the views of the Internal Revenue Service (IRS), concurred in by the Pension Benefit Guaranty Corporation (PBGC).

[4] *See generally*, discussion in the *Amicus* Brief of the United States, before the Circuit, at 10-11.

rate faster than these statutory minimums.[5] Employers enter into such private contracts every day, just as they frequently agree to pay wages in excess of $3.35 an hour.

Keysone failed to make a pension contribution of some $2,147,932 which was due, under this contract, for the 1979-80 year. The UAW, as it must, took the matter before an arbitrator. The arbitrator held that the contract required the payment, with interest.

For the intervening four or five years,[6] Keystone has forestalled this contractual obligation, largely by arguing that, because the IRS granted a § 303 waiver[7] of the minimum statutory obligation, it is contrary to "public policy" to enforce this private contract. That is, the contract debt is void.

Initially, two members of the panel[8] were swayed by this assertion. Judge Coffey dissented with vigor. On reading the initial opinion, the IRS and the PBGC, the very agencies charged with administration of ERISA, were moved to urge the Circuit, in clear terms, to reject Keystone's argument:

> That award, however, was based on Keystone's obligation under its collective bargaining agreement with the Union to make specified, annual contributions to its employees' pension plan. In our view, there is no public policy barring such an agreement

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[5] The Petition intimates that Keystone never really refused to pay, and no one is really hurt. If so, one wonders why Keystone ever litigated this matter. Both PBGC, who would have to pay under Title IV of ERISA, 29 U.S.C. § 1341, *et seq.*, if the plan terminated, and the participants (through the Union) see an injury. We suggest that these views are more credible than the self-serving rationale of a defaulting debtor.

[6] October 8, 1982, when the original Award was issued, to date. The period is longer if you count from the due date of the payment, *i.e.*, Spring of 1981 on a 1979-80 plan year.

[7] 29 U.S.C. § 1082.

[8] Flaum, J., joined by Jameson, Sr. D.J. of Montana.

> to make annual contributions to a pension plan. [Brief of the United States as *Amicus*, at 7]
>
> * * * *
>
> We find nothing, however, in the language of the waiver provisions or its legislative history that indicates that Congress intended to authorize the IRS to relieve an employer from its contractual obligations to make specified contributions to its employee's pension plan. . . . . Enforcement of an employer's contractual obligation to make certain contributions to its pension violates no policy of ERISA, even where such enforcement may result in a termination of the plan and where the IRS has granted the employer a waiver of the tax penalties that would otherwise attach to the employer's failure to satisfy the minimum funding requirements. [*Id.* at 9]

The panel then voted to rehear, withdrew the original opinion, and unanimously joined Judge Coffey's new opinion, enforcing the arbitration award. 793 F. 2d 810 (7th Cir. 1986), Pet. App. 1a-15a.

ARGUMENT

The final opinion below is scarcely as exciting as Keystone imagines. To be sure, the original opinion (now withdrawn) *was* exciting, as the need for an *amicus* by the United States attests. But that misadventure is now past. We are left with a routine judgment, enforcing a garden-variety arbitration award. That enforcement is premised on perfectly ordinary principles:

> [W]e hold that ERISA does not forbid parties to collectively bargain for obligations greater than, and separate from, the ERISA minimum funding obligations. [793 F. 2d at 814, Pet. App. 8a]

The United States, the Circuit, the UAW, and the participants all agree that *no* public policy is endangered here:

> The Justice Department argues, and we agree, that enforcement of an employer's contractual funding obligations is not in violation of any policy provision of ERISA. On the basis of this statutory scheme, we reject Keystone's argument that the IRS's determination of the employer's obligations under ERISA should be determinative of the contractual rights of private parties since the statute is structured to temporarily waive only the statutorily created right to minimum pension funding. [793 F. 2d at 815, Pet. App. 10a]

It should be remembered that these expressions come from the IRS, the *same* agency which granted Keystone its vaunted § 303 waiver, and the PBGC, which will have the honor of paying for any plan termination. There is no suggestion that any other Circuit disagrees, quite the contrary.[9] In this setting, Keystone's isolation completes the story which its self-interest began.

It is a tribute to the integrity of Judges Flaum and Jameson that, seeing their error, they withdrew the opinion and joined Judge Coffey. Such intellectual honesty ought not be an occasion for comment, much less a ground for *certiorari*.

Even if Keystone's fears were well taken, this is *not* the case in which to address the impact of "public policy" considerations on arbitration awards. Here the vitiation of private rights is by an Article I agency—which itself disclaims any such intent—under *ex parte* conditions required by a separate statute.[10]

As the decision below concludes,[11] if Keystone is right, two fatal constitutional blows will fall on ERISA's mini-

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[9] 793 F. 2d at 813-814, Pet. App. 7a-8a, discussing the Third Circuit's decisions. The D.C. Circuit's recent *Am. Postal Workers v. U.S. Postal Service*, 789 F. 2d 1, 8-9 (D.C. Cir. 1986), uses even stronger language in rejecting a "public policy" attack on routine arbitration awards.

[10] 26 U.S.C. § 6103.

[11] 793 F. 2d at 816-18, Pet. App. 11a-15a.

mum funding scheme: (i) lack of Fifth Amendment Due process, under *Mathews v. Eldridge*, 424 F. 2d 319, 335 (1976); and (ii) an unconstitutional delegation of an Article III judicial power, adjudication of private contract rights, to an Article I Agency, contrary to *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 69-70 (1982).

This Court has long warned against inviting unnecessary constitutional adjudication. This teaching is particularly apt here. The Seventh Circuit's resolution avoids the need to address either constitutional issue. The United States, as guardian of the "public policy" at issue, does *not* want them addressed. Finally, as the Circuit's answers are correct, so no mischief is done by waiting for a more opportune case.

CONCLUSION

For these reasons, we urge the Court to *deny* the Petition.

Respectfully submitted,

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